90-972

No. __-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BRUCE M. JONES, DENNIS RAY LINK AND SHARON R. LINK, individually and on behalf of all others in the State of California similarly situated,
Petitioners,

v.

EDWARD J. DERWINSKI, Secretary of Veterans Affairs, UNITED STATES OF AMERICA, U.S. DEPARTMENT OF VETERAN AFFAIRS, and LEO WIRSHMIDT, Director, San Francisco Regional Office of the Department of Veteran Affairs,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

California's anti-deficiency law bars deficiency judgments following foreclosures of purchase-money mortgages on single-family homes. The borrower is not liable -- either to a lender or to a guarantor -- for any such deficiency. Many thousands of California veterans purchased homes with mortgage loans guaranteed by the Veterans Administration pursuant to the Home Loan Guaranty Program, 38 U.S.C. §§ 1801 et. seq. Thousands have suffered foreclosures with resultant deficiencies stated by the VA to be in excess of $200,000,000. The VA claims entitlement to those deficiencies under its program. The questions presented are:

1. Whether United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L. Ed. 2d 908, (1961) requires that veterans be denied the benefits of California anti-deficiency law if they purchased homes in California with mortgages guaranteed by the VA.

2. Whether this Court's more recent decision in United States v. Kimbell Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L. E.d. 2d 711, (1979), rather than Shimer, provides the appropriate standard for determining whether California's anti-deficiency law has been displaced by a federal regulation adopted pursuant to a general enabling statute.

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The opinion of the United States District Court for the Northern District of California (Appendix A) is reported at 699 F.Supp. 795. The memorandum opinion of the United States Court of Appeals for the Ninth Circuit (Appendix B) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 580b of the California Code of Civil Procedure provides in relevant part:

> No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchaser price of real property, or under a deed of trust, or mortgage, on a dwelling for not more than four families given to secure repayment of a loan which was in fact used to pay all or part of the purchase price of such dwelling occupied, entirely or in part, by the purchaser.

2. 38 U.S.C. 210(c)(1) provides in relevant part:

> The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans Administration and are consistent therewith . . . .

3. 38 C.F.R. 36.4323(e) provides:

> Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. Chapter 37 shall constitute a debt owing to the United States by such veteran.

I. STATEMENT OF THE CASE

A. INTRODUCTION

For more than fifty years, California has protected all purchase money mortgage borrowers from deficiency judgments following the loss of their homes through foreclosure.[1] The borrower is not liable for any such deficiency, either to a lender or to any third party, including any guarantor.

This action challenges the Veterans Administration's position that its regulation, adopted pursuant to a general enabling statute, requires adoption of a federal rule of decision which disregards California law and entitles the VA to collect deficiencies from veterans who purchased homes in California with VA guaranteed mortgage loans and then lost them through foreclosure. That result, according to the court below, is mandated by this Court's decision in United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L. Ed. 2d 908, (1961). But

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[1] "Purchase money" means money borrowed to pay all or a part of the purchase price of a dwelling of not more than four units occupied entirely or in part by the purchaser. Cal. Civ. Code § 580b.

reliance on Shimer is misplaced. That case is distinguishable and, in any event, should not be regarded as controlling precedent for preemption of California's antideficiency laws, especially in light of this Court's more recent decisions narrowing the circumstances in which the federal government can displace state law in areas traditionally regulated by the states. This case is of enormous importance to thousands of California veterans and their families who have been, and are being, pursued by the Veterans Administration for deficiencies claimed to be in excess of $200,000,000.[2] Moreover, Arizona and Oregon have antideficiency laws similar to California's. At this date, class actions in Arizona and Oregon have been decided against the veterans primarily on the strength of Shimer, and are pending on appeal to the Ninth Circuit.

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[2]See Declaration of R. Keith Pedigo, VA's Director of the Loan Guaranty Service, attached as Exhibit H to VA's motion for partial summary judgment in the district court.

U.S. v. Berkeley/ Shepard v. Derwinski (consolidated)

No. 90-15911; Connelly v. Derwinski, No. 89-35543.[3]

B. THE MATERIAL FACTS

This suit was brought as a class action in the United States District Court for the Northern District of California by petitioners, veterans and their spouses, on their own behalf and on behalf of others similarly situated. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1346. On cross-motions for summary judgment, the district court granted judgment in favor of the VA. The undisputed material facts are these:

The proposed class are all veterans and/or their spouses who bought homes in California under the VA Home Loan Guaranty program. In each case, their homes were foreclosed upon by a private note holder who was protected against risk of loss (up to the lesser of 60% of the loan amount or $27,500) by a VA guaranty. In each case, when the home was sold at the

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[3]The government's motion for summary affirmance of these cases was denied by the Ninth Circuit on November 6, 1990.

foreclosure sale, it yielded less cash than the outstanding balance of the guaranteed loan, plus accrued interest and the cost of foreclosure. In each case, the note holder collected the shortfall from the VA under the guaranty. Claiming rights of subrogation and indemnity, the VA then set out in pursuit of the veteran to collect the money that it had paid to the note holder. A variety of collection devices have been utilized, e.g., withholding disability, pension or other benefits, intercepting IRS refunds, initiating litigation.

The named petitioners are Bruce M. Jones and Ray and Sharon R. Link. Mr. Jones is a 100% disabled veteran. The VA is withholding 100% of his benefits as an offset against a deficiency of approximately $17,000. Mr. Link is a veteran. The VA has asserted a deficiency claim against Mr. and Mrs. Link of approximately $2,200, and has threatened to initiate litigation against them.

C. CALIFORNIA'S ANTIDEFICIENCY LAW

California has a distinctive and comprehensive body of law regulating the right of note holders, guarantors and

indemnitees to obtain a personal judgment against a former homeowner. The effect of Cal. Code Civ. Proc. § 580b, supra, p. 2, is absolutely to bar deficiencies and to force the holder to look solely to the property when (as here) purchase money security is involved. This bar holds whether the foreclosure is effected judicially or nonjudicially. It holds whether the deficiency is sought by the lender or by a third-party guarantor.

As noted by the California Supreme Court, antideficiency protections serve two essential purposes:

First, forcing a seller or lender to bear the risk of insufficient security on a purchase money mortgage discourages the overpricing of real property; and second, in the event of a market decline and drop in property values, relieving the defaulting debtor from personal liability will benefit a sagging economy. Roseleaf Corp. v. Chierighino, 59 Cal.2d 35, 42, 27 Cal.Rptr. 873, 877 (1963).

Lenders' attempts to circumvent California's antideficiency laws by extracting guaranties or waivers have been consistently blocked. See, e.g., Freedland v. Greco, 45

Cal.2d 462, 289 P.2d 463 (1955); Powell v. Alber, 250 Cal.App. 2d 485, 58 Cal.Rptr. 657 (1967). Importantly, the antideficiency laws protect a borrower as fully when he is sued by a third party guarantor for reimbursement as when he is sued by the note holder for a direct deficiency. See Commonwealth Mortgage Assurance Co. v. Superior Court, 211 Cal.App.3d 508, 259 Cal.Rptr. 425 (1989). It is thus beyond dispute that application of California law would absolutely prohibit the VA from collecting a deficiency from petitioners.

D. FORECLOSURE AND THE CALIFORNIA VETERAN

By statute and regulation, holders of VA guaranteed notes are instructed to foreclose under state law. See 38 U.S.C. 1820(a)(6); 38 C.F.R. 36.4319, 36.4320. The VA has also promulgated separate and distinct mortgage and deed of trust forms for use in each state. While par. 33 of the VA's California deed of trust (VA Form 26-6303a), provides that the "rights, duties and liabilities of the parties" are to be governed by the VA statute and regulations, it specifically states in

par. 34: "This Deed shall be construed according to the laws of the State of California." (Emphasis added.)

Nowhere in the deed of trust form does it say that only a portion of California's foreclosure law will apply. It does not say that once the foreclosure sale has taken place, the shield from deficiencies provided for debtors by California law is replaced by a federal regulation that will be used as a sword by the VA. Nothing in any form provided by the VA advises the California veteran that by signing the form, he may be waiving important state law protections. Nowhere is the veteran borrower told that the same government which is making it possible for him to purchase his house is getting something that no private lender in California could get: the right to pursue him for a personal judgment once it has taken his house away.

E. THE DECISION BELOW

The court of appeals affirmed the district court's summary judgment in favor of the VA. In the Ninth Circuit's view, its decision in United States v. Rossi, 342 F.2d 505 (9th Cir. 1965), which in turn rested squarely on United States v.

Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L. Ed. 2d 908, (1961), was dispositive. Rossi, in reliance on Shimer, had held that California's antideficiency law was preempted by the VA's regulation, and Rossi "is still the law in this circuit . . ." (Appendix p.A-6.)

The Ninth Circuit distinguished its decision a few weeks earlier in Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir. 1990). In that case, another panel of the court had concluded that the State of Washington's antideficiency legislation was not preempted by the VA regulation "because the two were reconcilable." (Appendix p.A-6). Under Washington law, the court noted, a private lender would be able to obtain a deficiency if it chose to foreclose through judicial foreclosure. California did not permit the recovery of a deficiency regardless of the nature of the foreclosure. The court reasoned that, since the Washington lender had not sought judicial foreclosure, it would not be entitled to a deficiency under Washington law, and, accordingly, neither should the VA. The VA's argument in Whitehead that it had an independent right of indemnification

under its regulation was rejected by the Ninth Circuit; in this case, on the ultimate authority of Shimer, it was accepted.

II. ARGUMENT FOR ALLOWANCE OF THE WRIT

A. SHIMER IS DISTINGUISHABLE AND SHOULD NOT CONTROL.

Thousands of California veterans and their families should not be denied the benefits of California's protective antideficiency legislation on the authority of Shimer. Neither its facts nor its underlying legal principles requires such a result.

In Shimer, the VA had sued a foreclosed-upon veteran in Pennsylvania for the amount the agency had paid to the note holder. As a prerequisite to a deficiency judgment, Pennsylvania law requires a judicial determination of the fair market value of the foreclosed property, which must be credited to the borrower's deficiency liability. When the holder fails to bring a timely proceeding to obtain such a determination, both the borrower and the guarantor are permanently discharged. Thus, while Pennsylvania did not prohibit deficiency judgments,

it did impose safeguards to limit their amount.[4] Applying Pennsylvania law, the court of appeals in Shimer held that since the holder had not obtained a judicial "fair value" determination, the VA had not been obliged to pay the holder anything under the guaranty, and thus could not recover from the veteran. 367 U.S. at 376-77.

This Court reversed. The first question addressed by the Court was whether very detailed VA regulations specifying its guaranty obligations to note holders (and not the indemnity regulation) displaced inconsistent state law. After reviewing in detail the regulations and the specific, substantive statutory provisions they were intended to implement, 367 U.S. at 377-78, the Court concluded that, while "intended to remedy the same abuses" as the Pennsylvania law, they were inconsistent with that law. It then held:

> We have no doubt that this regulatory scheme, complete as it is in every detail, was intended to provide the whole and exclusive protection of the

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[4]Commonly known as "fair value" determinations, they are required in many states where deficiencies are permitted.

> interests of the [VA] as a guarantor and was, to this extent, meant to displace inconsistent state law.

367 U.S. at 381.

Next, the Court turned to the question of whether the VA statute authorized the agency to displace state law with its guaranty calculation regulation, expressly limiting its inquiry to that regulation. 367 U.S. at 382. It concluded that the VA had such authority. 367 U.S. at 385. Any other result would have sundered the program, since subjecting lenders to the vagaries of state law, 367 U.S. at 384, as a precondition to collecting on guaranties would unquestionably have resulted in their declining to participate in the program. The same cannot be said about the indemnity regulation. Lenders in California would not fail to participate in the VA home loan program if the VA (like other California guarantors) were not entitled to indemnification from the homeowner.

Other important distinctions exist between Shimer and this case. Pennsylvania did not prohibit deficiencies on purchase money mortgages. Pennsylvania simply erected a procedure for their calculation in conflict with a detailed VA

regulation which was central to the successful conduct of the program. California flatly prohibits deficiencies on purchase money mortgages. VA's indemnity regulation, 38 C.F.R. §§ 4323(e), purports to obligate veterans to the VA for "[a]ny amounts paid by the [VA] on account of the liabilities of any veteran guaranteed . . ." under the Act (emphasis added). California, by extending the reach of its antideficiency law to bar a guarantor's claim against a purchase money debtor, has done something which Pennsylvania did not do: altered a fundamental principle of suretyship. In short, under California law, the veteran, following foreclosure of his home, is not liable to anyone, lender or guarantor. Thus, on the very face of it, there is, arguably, no conflict between California's foreclosure law, which VA directs its lenders to follow, and the indemnity regulation.

The key question -- not addressed in Shimer or the court below -- is whether California's fundamental change in suretyship law, the product of almost 50 years of California legislative action and court decision, is to be displaced by an

ambiguous VA regulation, which, unlike the guaranty calculation regulation in Shimer, has (i) no nexus in statutory language, (ii) no relationship to any congressional intent expressed in contemporaneous committee reports or floor debates, (iii) no meaningful "detail," (iv) no direct or indirect expression of intent to preempt, and (v) no meaningful impact on proper functioning of the VA home loan guaranty program. These issues were not addressed by Shimer, and that decision therefore should not govern the outcome of this case.[5] The

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[5]Indeed, the Ninth Circuit panel which decided Whitehead, supra, p. 10, and upheld the application of Washington law, refused to give Shimer the reach sought by the VA.

> Unlike the regulation in Shimer, the regulations at issue here do not provide a scheme for foreclosure "complete in every detail." While the regulations provide for an independent right of indemnity, they do not establish specific foreclosure procedures. In contrast to the tightly woven regulation addressed in Shimer, the regulations addressing foreclosure procedures are a loose framework that takes its substance and specificity from applicable state or local laws. . . . They therefore do not indicate an intent to displace applicable state law, as did the regulations in Shimer.

904 F.2d at 1368.

Court below viewed its 1965 decision in United States v. Rossi, 342 F.2d 505 (9th Cir. 1965), which rested on Shimer, as dispositive. Petitioners submit that it erred in doing so, and urge this Court to correct that error.

B. APPLICATION OF THE KIMBELL FOODS TEST AND MODERN PREEMPTION ANALYSIS REQUIRES ADOPTION OF CALIFORNIA ANTIDEFICIENCY LAW AS THE FEDERAL RULE OF DECISION.

Introduction:

As noted, the Ninth Circuit did not go beyond its determination that Shimer and Rossi were controlling. It did not undertake any independent preemption analysis of the issues. Accordingly, the Court might consider it appropriate, should it agree with our position with respect to Shimer, simply to remand the case to the Ninth Circuit to resolve the preemption issues without the constraints of Shimer. We urge the Court not to follow that course. The facts are undisputed. Thousands of veterans have been, and continue to be, pursued by the VA through assorted collection devices, including the withholding of disability and other pension benefits. They are

surely entitled to an expeditious resolution of the legal issues. Accordingly, in their deserving interest, as well as in the interest of judicial economy, the better course would be for the Court on review to resolve the preemption issues without further assistance from the Court of Appeals. We now turn to those issues.

To begin, federal law unquestionably governs the rights of the United States under a nationwide federal program. United States v. Kimbell Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L. E.d. 2d 711, (1979). The crucial issue, of course, concerns the content of the federal law. In Kimbell Foods, this Court held that "[I]n the absence of an applicable act of Congress," the courts must determine whether to fashion a uniform federal rule or apply state law as the federal rule of decision, looking to: (1) whether the issue requires "a nationally uniform body of law"; (2) whether application of state law would frustrate specific objectives of the federal programs"; and (3) whether "application of the federal rule would disrupt commercial relationships predicated on state

law." 440 U.S. at 728-29. In this case, application of Kimbell Foods and its progeny requires that California antideficiency law be adopted as the federal rule of decision.

1. There has been no displacement of state law by the VA statute.

The government cannot point to a single word of legislative history or to any provision of the Home Loan Guaranty chapter of the VA statute applicable to this case that purports to preempt or displace state law with respect to mortgage deficiencies or "indemnities" or that even addresses the question. Indeed, in 1973, Congress considered, but did not adopt, a federal foreclosure bill that would have covered VA guaranteed loans. S. 2507, 93rd Congress. That is not to say that Congress is unable to craft a comprehensive federal foreclosure statute expressly preemptive of state law when it thinks it appropriate to do so. See e.g., 12 U.S.C. 3701 (1981 Amendment to National Housing Act creating uniform federal foreclosure remedy).

For VA home loans closed after December 31, 1989, Congress has provided a uniform federal rule relieving veterans from liability for deficiencies in the absence of fraud, misrepresentation or bad faith. Veterans' Amendments of 1989, Pub.L.No. 101-237, § 304, 103 Stat. 2062, 2073 (to be codified at 38 U.S.C. § 1803). But this provision is prospective only, and the Ninth Circuit itself observed that "[t]his change reflects Congress' recognition that, under the former legislation, the various state schemes applied, with varying results as to the collection of deficiency judgments. Whitehead v. Derwinski, 904 F.2d 1362, 1371 fn.10.[6]

The only statutory language in this case which the VA can rely upon as underpinning its indemnity regulation (assuming its applicability) is the statute's general enabling provision which reads:

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[6]The Ninth Circuit thus apparently dismissed the VA's argument that Congress's silence prior to 1989 should be construed as agreement with VA's interpretation of its indemnity regulation. See, also, Chicago Title Ins. Co. v. Sharred Village Assoc., 708 F.2d 804, 804 (1st Cir. 1983) (citing Kimbell Foods).

> The Administrator has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Veterans Administration and are consistent therewith . . . .

38 U.S.C. Section 210(c)(1).

But if anything has been made clear in the area of preemption analysis since Shimer it is that, absent a clear statutory anchor -- and not simply general language authorizing the promulgation of regulations -- a regulation cannot nullify a statute embodying a powerful state policy. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448, 59 L. E.d. 2d 711, (1979); Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed 2d 208 (1979) (For substantive regulations to have the "'force and effect of law' . . . it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress"); United States v. Walter Dunlop & Sons, Inc., 800 F.2d 1232, 1239 (3rd Cir. 1986) ("Kimbell's holding is . . . a finding that in the area of federal lending programs regulations . . . enacted under a general enabling provision do not constitute the sort of explicit 'congressional directive' that will displace the

application of state law"). See, also, Sitton v. United States, 413 F.2d 1386 (5th Cir. 1969), cert. denied, 397 U.S. 988, 90 S.Ct. 1118, 25 L. Ed. 2d 395, (1970) (distinguishing Shimer and refusing to override Texas coverture law to give the VA a deficiency).

Modern preemption law thus demonstrates a profound, and proper, reluctance to displacement of state law in the absence of a clear showing of Congressional intent, reflected in statute, to exercise Supremacy Clause powers. And this is particularly evident with respect to displacement of longstanding state law relating to real property, see Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), or in other areas traditionally regulated by the states. See Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 105 S.Ct. 2371, 85 L. Ed. 2d 714, (1985); California v. ARC America Corp., 490 U.S. 93, 109 S.Ct. 1661, 104 L. Ed. 2d 86 (1989).

The requisite Congressional intent to preempt California's antideficiency laws is not present, and the VA regulation relied upon there simply does not suffice.

2. California's antideficiency law is the appropriate federal rule of decision.

As noted above, "in the absence of an applicable act of Congress," Kimbell Foods, supra, 318 U.S. at 367, requires application of a three-prong test to determine whether to fashion a uniform federal rule or apply state law. The three prongs are (a) whether the issue requires a nationally uniform body of law; (b) whether application of state law would frustrate VA program objectives; and (c) whether application of a uniform federal rule would disrupt commercial relationships predicated on California law. Application of the Kimbell Foods test shows that this Court should adopt a federal rule of decision which applies California's antideficiency laws.

(a) There is no need for a nationally uniform body of law.

The Small Business Administration and Farmer's Home Administration programs subjected to scrutiny by this Court in Kimbell Foods are no less national programs than is the VA

Home Loan Guaranty Program. In Kimbell Foods, the Court adopted state law.

The VA's foreclosure-related regulations are replete with references to state law, see supra, p. 8, a matter given considerable weight by the Court in Kimbell Foods.[7] The deed of trust form promulgated by the VA expressly for use in California -- the single most critical document in any foreclosure -- states, in par. 34: "This Deed shall be construed according to the laws of the State of California." (Emphasis added.) Finally, this Court has emphasized, in a case decided during the same term as Kimbell, that laws relating to real property are particularly within the state's interest, and should be adopted as the federal rule of decision. Wilson v. Omaha Indian Tribe, supra, 442 U.S. at 674.

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[7][A] fair reading of the SBA Financial Assistance Manual . . . indicates that the agency assumes its security interests are controlled to a large extent by the commercial law of each state." Kimbell, 440 U.S. at 731. The Ninth Circuit's panel in Whitehead, supra, 10, expressly acknowledged that "the VA regulations themselves contemplate application of state law to foreclosure proceedings." 904 F.2d at 1371.

(b) Application of California's Antideficiency Law Would Not Frustrate VA Program Objectives.

The government has argued that denying it access to deficiencies will turn the guaranty program into a "grant program," contrary to Congressional intent. That assertion assumes that veteran borrowers are more likely than other borrowers to disregard their mortgage obligations, and rank retention of their homes as a lower priority than do other homeowners. Common sense, of course, tells us that the very last thing a homeowner financially in extremis does is stop paying his mortgage.[8] This Court's response to a similar argument advanced by the government in Kimbell Foods was:

> Because the SBA and FHA make loans only when private lenders will not, the United States believes that its security interests demand greater protection than ordinary commercial arrangements. We find this argument unconvincing. The lending agencies do not indiscriminately distribute public funds and hope that reimbursement will follow. . . . Both agencies have promulgated exhaustive instructions to ensure that loan recipients are financially

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[8]For this reason, the likely result of the VA's pursuit of a deficiency is the declaration by the veteran of bankruptcy. See, e.g., In re Cole, 81 Bankr. 326 (1988); In re Fontaine, 42 Bankr. 321 (1984).

> reliable and to prevent improvident loans. The government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc.

440 U.S. at 737 (emphasis added).

In fact, the VA has collected only an insignificant portion of the national deficiency debt, and the vast bulk of that it has wrung from veterans whose disability and other benefits payments are being withheld. The VA has not demonstrated that the viability of its program is threatened or that it needs collection weapons more powerful than those available to private lenders. See Kimbell Foods, 440 U.S. at 737.

C. Application of a Uniform Federal Rule Would Disrupt Commercial Relationships Predicated on California Law.

Again, Kimbell Foods is instructive:

> Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, [footnote omitted] we hesitate to create new uncertainties in the absence of careful legislative deliberation. . . .[T]hus, the prudent course is to adopt the ready made body of state law as the federal rule of decision until Congress strikes a different accommodation. [Footnote omitted.]

440 U.S. at 739-40. Here, too, important expectations would be thwarted by sweeping aside California's antideficiency law. The most significant of those expectations, of course, is that of the borrower who does not expect that by giving a deed of trust to secure a purchase money loan he is putting his entire net worth at risk. Second, extenders of commercial and consumer credit in California operate on the expectation that foreclosure of a purchase money mortgage will not make all of the assets of their debtors vulnerable to a deficiency claim by the holder of that mortgage. Third, holders of non-purchase money security interests operate on the assumption that, if the circumstances warrant, they may foreclose judicially and have access to a deficiency judgment which can be levied against other assets of the debtor.

The government's argument below, that depriving veteran borrowers of the protection of California's antideficiency laws "does not interfere with a state's ability to protect debtors residing in its state," is as bizarre as its view that the VA's indemnity claim somehow stands outside the foreclosure

process. The government would leave the veteran borrower at the mercy of the VA's "waiver" procedures, in place of the absolute protection afforded by California law. The ratio of waivers granted to those denied by the VA in these circumstances could hardly make a borrower enthusiastic about his chances. Moreover, if his case is to be presented effectively, he must pay for representation, be prepared to travel to a VA office for a hearing and, ultimately, to pay a lawyer to prosecute an appeal.[9] No one familiar with either the VA process or with the narrow scope of review of agency action under the Administrative Procedure Act, 5 U.S.C. Section 701 et seq., could regard the protections afforded by that process as a fair trade for the protection of California's antideficiency laws, if indeed denials of waiver applications are reviewable at all. See 38 U.S.C. Section 211(a).

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[9]Up until 1986, if the veteran "won" a waiver, an IRS form 1099 was sent by the VA to the IRS, generating a nondischargeable debt for the tax liability that arises from the "forgiveness" of the deficiency "debt."

In summary, application of the Kimbell test shows that this Court should adopt a federal rule of decision which applies California's antideficiency laws. Prior to 1989, Congress never demonstrated the slighest intent either to displace state law or to require the courts to adopt and apply a uniform national rule. None of the objectives of the Home Loan Guaranty Program will be frustrated by the application of state law to the collection of pre-1990 loan deficiencies. Finally, the failure to apply state law would directly frustrate California public policy protecting debtors (for which the VA's "waiver" procedure is not an adequate substitute) and would disrupt commercial relationships predicated on that policy.

For all of these reasons, petitioners urge the Court to grant the petition and to hold that California's antideficiency law should be adopted as the federal rule of decision.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: December __, 1990.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE M. JONES, DENNIS RAY, LINK and SHARON R. LINK, individually and on behalf of others in the state of California similarly situated, Plaintiffs-Appellants, v. EDWARD J. DERWINSKI, Secretary of the Department of Veteran Affairs, [**]UNITED STATES OF AMERICA, U.S. DEPARTMENT OF VETERAN AFFAIRS, [***]and LEO WURSHMIDT, Director, San Francisco Regional Office of the Department of Veteran Affairs, Defendants-Appellees.	C.A. No. 89-15053 D.C. No. CV 87-4702-JPV MEMORANDUM[*]

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] Edward J. Derwinski, Secretary of the Department of Veteran Affairs, is substituted for his predecessor, Thomas Turnage, former Administrator of the Veterans Administration. Fed. R. App. P. 43(c)(1).

[***] The U.S. Department of Veteran Affairs was previously the U.S. Veterans Administration. Fed. R. App. P. 43(b).

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, District Judge, Presiding
Argued and Submission Deferred: March 15, 1990
Resubmitted: June 7, 1990
San Francisco, California

Before: TANG and BEEZER, Circuit Judge, and STEPHENS,**** District Judge

Plaintiffs appeal the district court's grant of summary judgment to defendants in plaintiffs' action seeking an injunction preventing defendants from enforcing debts in violation of California Civil Code § 580(b). We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs Bruce Jones and Ray and Sharon Link are veterans and their spouses who have borrowed money from lenders pursuant to the Veterans Administration Home Loan Guaranty Program (VA Program), 38 U.S.C. §§ 1801, et seq. Under this program, veterans receive home loans from qualified lenders and the Federal government guarantees the veterans'

**** The Honorable Albert Lee Stephens, Jr., Chief Judge Emeritus, Central District of California, sitting by designation.

performance. Plaintiffs bought homes under the VA Program, but eventually defaulted on their obligations, and the government paid any deficiency owed by the plaintiffs after foreclosure. The government is presently seeking indemnification under the VA Program from the plaintiffs for any amounts paid on behalf of the plaintiffs as guarantor.

Plaintiffs brought this action in district court seeking an injunction against the VA from enforcing these debts against them, and against any others similarly situated. The plaintiffs argued that the California anti-deficiency statutes prevent enforcement of these debts. The district court granted summary judgment to the defendants on the parties' cross-motions for summary judgment on the ground that to the extent the law of California infringes on federal law it is preempted. Judgment was entered against the plaintiffs on November 14, 1988. Notice of appeal was filed on January 11, 1989. This notice was timely since the United States and its agents are parties to the suit. Fed. R. App. Pro. Rule 4(a)(1).

DISCUSSION

Whether a federal regulation preempts a state statute is a question of law. The standard of review in this issue is de novo. Olympic Sports Products, Inc., v. Universal Athletic Sales Co., 760 F.2d 910, 912 (9th Cir. 1985), cert. denied, Whitaker v. Olympic Sports Product, Inc., 474 U.S. 1060 (1986).

In this case, we are considering whether a federal regulation, 38 C.F.R. § 36.4323(e), preempts California law to the extent that the two conflict. The interaction between 38 C.F.R. § 36.4323(e) and state anti-deficiency laws, in general, and California anti-deficiency laws, in particular, has been examined previously.

The Ninth Circuit considered this precise issue in United States v. Rossi, 342 F.2d 505 (9th Cir. 1965). The court concluded that

> the regulations governing guaranty procedures were intended by Congress to provide a uniform system for determining the Administrator's obligation as guarantor and to displace state law in their operation, and that they

> provide an independent right of indemnity to the Veteran's Administration, regardless of the failure of a lender's rights against the principal.

Rossi, 342 F.2d at 506. See also McKnight v. United States, 259 F.2d 540 (9th Cir. 1958) (holding the Cal. Civ. Pro. Code § 580b may not impair VA's independent right to seek indemnity under 38 C.F.R. § 36.4323(e)).[1]

The Ninth Circuit has had occasion recently to reexamine this precedent in light of subsequent decisions. In Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir. 1990), we held that Washington anti-deficiency legislation is not preempted by the VA

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[1] In United States v. Shimer, 367 U.S. 374 (1961), the Supreme Court held that the Pennsylvania Deficiency Judgment Act was preempted by 38 C.F.R. Part 36. The Pennsylvania statute created a fair market value limitation on deficiency judgments. In that case, the plaintiff had also argued that the government did not have a right of indemnity against the veteran. The Court held that 36 C.F.R. 36.4323(e) gave the government this right. Id. at 387. This regulation did not explicitly state that it preempted state law, nor did Congress occupy the entire field. However, compliance with both laws would have been impossible, and, therefore, the Supreme Court held that the state law was preempted. Id. at 381.

Program regulations because the two were reconcilable. In reaching this decision, we found that the applicable federal common law included Washington state law because the two were not necessarily mutually exclusive. Under Washington law, a lender can recover a deficiency judgment when enforcing a purchase money mortgage by foreclosing through judicial foreclosure. Since this allows the Veterans Administration to recover a deficiency, the two bodies of law are reconcilable and Washington law was adopted as the federal rule for decision. In reaching this conclusion, we pointed to the differences between Washington anti-deficiency legislation and California anti-deficiency legislation. The fact that California does not allow any recovery of a deficiency in a purchase money mortgage by either the lender or a guarantor distinguishes the case involving Washington law from the Rossi and McKnight precedents. These decisions were explicitly affirmed as part of the logic in reaching the above conclusion.

In the present case, the plaintiffs raise the exact issue that was decided in Rossi. We find that Rossi is still the law in this

circuit, and that under that decision, 38 C.F.R. § 36.4323(e) gives the Veterans Administration a right of indemnification in California against veterans for whom a debt has been paid pursuant to the home loan guarantee program. Therefore, given the precedents of Rossi and McKnight, and the logic of Whitehead, the district court was correct in its conclusion that federal law preempts state law, and that defendants were entitled to summary judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRUCE M. JONES, DENNIS RAY LINK, and SHARON R. LINK individually and on behalf of all others in the state of California similarly situated, Plaintiffs, vs. THOMAS TURNAGE, or his successor, Administrator of the Veterans Administration, et al., Defendants.	No. C-87-4702 JPV MEMORANDUM OF OPINION and ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT and DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment and partial dismissal and plaintiffs' cross-motion for summary judgment came before the Court on August 11, 1988. The motions were submitted on the pleadings. Having reviewed tbe pleadings submitted in support of and in opposition to these motions, the Court makes the following determinations.

I. BACKGROUND

Plaintiffs Bruce M. Jones and Dennis Ray Link are United

States Armed Services veterans who bought houses through the Veterans Administration's ("VA's") loan guaranty program. At the time they purchased their homes, they signed agreements with the VA in which they promised to reimburse the VA for any moneys paid by the VA on their behalf. Plaintiff Sharon R. Link is Dennis Link's wife; she never signed an indemnity agreement with the VA.

Plaintiffs failed to make payments on their loans from private lenders, and the loans were subsequently foreclosed. The private lending institutions sold the mortgaged property for less than the outstanding balance on the loan; accordingly, a deficiency was left. Pursuant to its guaranty with the mortgagee, the VA paid the deficiency.

Both Jones and Mr. Link requested waivers of their loan guaranty debt, which the VA denied. Plaintiffs apparently had opportunities to appeal the VA's initial denial of the waiver requests to the Board of Veteran Appeals, but elected not to do so.

Plaintiffs then filed a complaint in this Court, seeking an injunction pursuant to California's Anti-Deficiency Law (Cal.Code

Civ.Proc. § 580b) barring defendants from collecting from plaintiffs the deficiencies left after the sale of their residences and compelling the VA to return funds previously collected or withheld. The complaint was filed as a class action, on behalf of all other veterans or widows of veterans eligible for VA loan guaranties and against whom a claim by the VA has been or will be made to collect a deficiency following a foreclosure on the class member's residence. The Court has not made any decision as to certification of this class.

Defendants now move for summary judgment, seeking an order of this Court that plaintiffs' claims are barred as a matter of law. Alternatively, defendants United States, the Veterans Administration, and Leo Wurschmidt, Director of the San Francisco Regional Office of the VA, move for dismissal of all claims against them on the ground that this Court lacks jurisdiction over them. Plaintiffs have filed a cross-motion for summary judgment, seeking a finding that California's Anti-deficiency Law applies to defendants' claims against plaintiffs, and is not preempted by federal law.

II. DISCUSSION

A. The VA Home Loan Guaranty Program

The VA offers veterans the opportunity to obtain guaranties of home loans from non-VA lenders. See 38 U.S.C. §§ 1801-32. A veteran may obtain a VA guaranty upon payment to the VA of 1% of the total loan amount. Id. § 1829(a). A VA guaranty offers the veteran certain advantages. Often lenders do not require a down payment on the house, and the interest rate, set by the VA Administrator, is usually below the market rate. Id. § 1803(c); 38 C.F.R. § 36.4311 (1987). The VA regulations also limit the closing costs, charges, and fees assessed veterans. 38 C.F.R. § 36.4312 (1987).

The VA's guaranty obligates it upon the veteran's default to reimburse the mortgagee. 38 C.F.R. § 36.4321(a) (1987). Should the mortgaged property's net value fall short of the total indebtedness, the United States becomes liable under the guaranty for the deficiency. 38 U.S.C. § 1816(c)(8); 38 C.F.R. § 36.4321 (1987). When this action was filed, the United States' maximum liability for each loan guaranty was the lesser of 60%

of the total loan or $27,500. 38 U.S.C. §§ 1803(a)(1), 1810(c); 38 C.F.R. § 36.4302(a) (1978).

If a lender meets the requirements of 38 U.S.C. § 1802(d), the loan may be guaranteed without the VA's prior approval. In that case, the veteran applies for a guaranty through the lender, and the lender determines whether the veteran qualifies for a VA home loan guaranty. If the veteran qualifies, the agreement between the VA and the veteran is set forth on VA Form 26-1820-- "Report of Home Loan Processed on Automatic Basis."

If the lender does not meet the requirements of 38 U.S.C. § 1802(d) or if the lender is unsure whether the veteran's credit is sufficient for a VA guaranteed loan, the loan is processed on a non-automatic basis. In that case, the veteran and lender jointly apply for a guaranty by submitting VA Form 26-1802a--"VA Application for Home Loan Guaranty"--to the VA. The VA then reviews the application and determines whether the veteran qualifies for a VA guaranty. If the guaranty is approved, the loan is guaranteed upon the veteran's and the lender's signature on VA

Form 26-1876--"Certification of Loan Disbursement."

The regulations governing the "Report of Home Loan Processed on Automatic Basis" and the "VA Application for Home Loan Guaranty" (collectively referred to as the "indemnity agreements") provide that they are governed by federal law. 38 C.F.R. § 36.4334 (1987). The regulations provide that any provision of the loan instruments inconsistent with the regulations is automatically amended to conform to the regulations. Id. The indemnity agreements also provide that they are governed by federal law and that the veteran will be liable for all amounts paid by the VA because of a veteran's default.

If the veteran defaults on loan payments, the note holder may foreclose on the property. The holder is required to inform the VA that the veteran has failed to make the required payments and that it intends to foreclose. Id. §§ 36.4315(a), 36.4317. Although the VA retains substantial control over how the sale is conducted, id. §§ 36.4302, 36.4324, the VA may begin and prosecute foreclosure proceedings only if the note holder fails to exercise reasonable diligence in foreclosing the property. Id. §

36.4319(f).

If a deficiency remains after the sale of the property, the VA must reimburse the holder up to the amount of the guaranty. Id. § 36.4321. After the VA pays on its guaranty, the VA has two alternative remedies to recover the amount paid. Id. § 36.4323(a), (e). First, the VA becomes subrogated to the note holder's rights and may pursue any causes of action the note holder may have had against the defaulting veteran. The VA's rights are junior to the holder's rights until the holder has received the full amount payable on the original contract with the veteran. Id. § 36.4323(a). Second, the VA has an independent right of indemnification which permits it to proceed directly against the veteran for the amount paid on the guaranty. See id. § 36.4323(e). Once the debt is established, the VA must deduct the amount of indebtedness from the benefits received by the veteran through participation in a VA-administered benefits program. 38 U.S.C. § 3114. The veteran has several avenues of challenging the VA's right to collect the debt before collection begins. See 38 C.F.R. § 1.911 et seq.

B. The California Anti-Deficiency Law

Foreclosures on homes purchased with the proceeds of a VA-guaranteed loan are conducted by the note holder in accordance with the law of the state in which the property is located. 38 U.S.C. § 1820(a)(6); 38 C.F.R. §§ 36.4319, 36.4320 (1988). Under California law, the holder of a loan may foreclose either judicially or non-judicially, so long as there is a power of sale provision in the mortgage or deed of trust. Cal. Civ. Code §§ 2931, 2924.

California Code of Civil Procedure § 580b prohibits any deficiency judgment from lying after a sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, on a dwelling, given to the vendor to secure payment of the balance of the purchase price of real property, or under a deed of trust or mortgage. Code of Civil Procedure § 580d bars judgments for any deficiencies upon a note secured by a deed of trust or mortgage upon real property where the real property was sold by the trustee or mortgagee under a power of sale provision.

As plaintiffs have noted, the California Legislature has also barred waivers of certain preforeclosure and antideficiency protections. Id. § 2953. California courts have held that contractual waivers of the bar on deficiency judgments are contrary to public policy. Palm v. Schilling, 199 Cal.App.3d 63, 244 Cal. Rptr. 600, 608-09 (1988). While § 580b generally does not prevent the lender from collecting a deficiency from a guarantor of the debt, e.g., Gottschalk v. Draper Companies, 23 Cal.App.3d 828, 830, 100 Cal. Rptr. 434, 436 (1972), there is an exception to this rule where the guarantor is in reality the principal debtor. Valinda Builders v. Bissner, 230 Cal.App.2d 106, 111, 40 Cal. Rptr. 735, 738 (1964). Plaintiffs cite one case which stated in dicta that a guarantor has no right under Cal. Civ. Code § 2847 (which provides that a principal is bound to reimburse a surety for the amount the surety disbursed to the principal's creditor) to get reimbursement from a principal for the amount the guarantor paid on a deficiency judgment arising from the principal's obligation. Heckes v. Sapp, 229 Cal.App.2d 549, 555, 40 Cal. Rptr. 485, 485 (1964); see also Union Bank v.

Gradsky, 265 Cal.App.2d 40, 46, 71 Cal. Rptr. 64, 69 (1968) (where creditor elects to pursue a nonjudicial sale of principal's secured property, guarantor of debt may not obtain a deficiency judgment against the principal).

Accordingly, the issue before this Court is whether the California Anti-Deficiency Law, Cal.Code Civ.Proc. § 580b, which appears to bar a deficiency judgment against a principal debtor by either a creditor or a guarantor, also bars the VA from seeking indemnity from a veteran for the amounts the VA has paid under its guaranty of the veteran's loan for any deficiency left after foreclosure.

C. Whether California's Antideficiency Law Bars All of the VA's Indemnity Rights Against Veterans for Deficiencies Left After Foreclosure.

Defendants raise two principal arguments in support of their motion for summary judgment and against plaintiff's motion for summary judgment. First, defendants argue that the regulations governing VA-guaranteed loans provide an independent right of indemnification from veterans who default on

their VA loans under 38 C.F.R. § 36.4323(e). Second, defendants argue that the VA must be governed by a nationwide, common law rule that permits the VA to recover indemnity from veterans for money paid under the VA guaranty as a result of the veteran's loan default.

1. 38 C.F.R. § 36.4323(e)

Upon payment of a VA home loan guaranty, federal regulations grant the VA two independent rights against a veteran who has defaulted on a loan. First, the VA is subrogated to the rights of the note holder, and thus obtains all the rights and obligations which the holder had. 38 C.F.R. § 36.4323(a) (1987). Second, the VA has a direct right of action for monies paid by the VA on behalf of the veteran. Id. § 36.4323(e). Defendants argue that the VA has consistently maintained that it is has two distinct rights for collection from veterans of moneys paid under its guaranty: one based on subrogation, the other on indemnity. See Decisions of the Administrator No. 645, 1 A.D.V.A. at 1151-64 (1945) (holding that the VA may recover from the veteran indemnification for the amounts the United States may pay

pursuant to the VA's guaranty of the veteran's debt, notwithstanding the existence of a state anti-deficiency law). A court must accord an agency's interpretation of its regulations substantial deference unless the interpretation is "plainly erroneous or inconsistent with the regulation[s]." State of California, Department of Education v. Bennett, 833 F.2d 827, 830 (9th Cir.1987). Accordingly, defendants argue that its claim of an independent right of indemnification under 38 C.F.R. § 36.4323(e) must be upheld.

Defendants further cite United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961). In Shimer, the United States sued a veteran to recover an amount of moneys that the VA, as guarantor of a loan made to him by a private lending institution, had paid to that institution upon the veteran's default. The United States argued both that it was subrogated to the rights of the lending institution and that it had an independent right of indemnity, citing 38 C.F.R. § 36.4323(e). The district court and court of appeals applied the Pennsylvania Deficiency Judgment Act, which prohibited a mortgagee from recovering a deficiency

judgment upon foreclosure unless it first obtains a court determination of the fair market value and credits that value to the unsatisfied liability. Id. at 377. The lower courts found that the debtor in this case was discharged from his entire debt after foreclosure, because the mortgagee had not followed the statutory procedure. Thus, the lower courts found that the VA, as guarantor, could not recover the deficiency amount it paid the mortgagee, as under the laws of surety, the surety may not collect from the principal any amount that the principal was not obligated to pay the mortgagee. Id. at 376-77.

The Supreme Court reversed, finding that the VA had a right to indemnity under 38 C.F.R. § 36.4323(e) independent of its right of subrogation. Shimer, 367 U.S. at 387, 81 S.Ct. at 1562. The Supreme Court noted with approval that the VA had previously determined that it could "recover over against the veteran on a theory of indemnity in situations where recovery by way of subrogation was barred by state law." Id. (citing Decisions of the Administrator of Veterans' Affairs, No. 645, supra). The court further held that 38 C.F.R. § 36.4323(e)

> is merely declaratory of a surety's customary right of indemnity for amounts paid pursuant to an obligation of the guarantor assumed with the consent of the principal. Restatement of the Law of Security § 104. This right is in general unaffected by defenses of the principal which are not available to the guarantor.

Shimer, 367 U.S. at 387-88, 81 S.Ct. at 1562-63. Shimer has since been followed by a number of circuits, including this one. See United States v. Rossi, 342 F.2d 505, 507 (9th Cir.1965); see also McKnight v. United States, 259 F.2d 540, 543-44 (9th Cir.1958) (holding that Cal.Code Civ.Proc. § 580b may not impair the VA's independent federal right under 38 C.F.R. § 36.4323(e) to seek indemnity from defaulting veteran).

Despite what appears to be a clear statement of the law, plaintiffs argue that the above-cited cases are either distinguishable or are no longer valid authority in light of more recent Supreme Court decisions. Plaintiffs essentially argue that neither the enabling VA statutes nor 38 C.F.R. § 36.4323(e) preempt or displace California law. Because the federal statutes governing the

VA Home Loan Guarantee Program are silent as to state law pre-emption, plaintiffs argue, the Court must infer that the California Anti-Deficiency Law prohibits the VA from seeking indemnity from defaulting veterans. Plaintiffs cite several VA regulations which refer to state and local laws as governing a foreclosure process. See, e.g., 38 C.F.R. § 36.4315(b)(2)(vii), 36.4320(d), and 36.4323(c).

Plaintiffs argue that Shimer is not applicable on several grounds. First, plaintiffs argue that no federal VA Home Loan Program statute has specifically displaced state law. Plaintiffs cite 38 U.S.C. § 1820(a)(6), which provides in part that the VA Administrator "shall not deprive any State or political subdivision thereof of its civil or criminal jurisdiction of, on or over such property ... or impair the rights under State or local law of any persons on such property." Plaintiffs conclude this law infers that Congress intended to adopt state anti-deficiency laws as federal law and to prevent the VA from seeking indemnity from a veteran following foreclosure. Second, plaintiffs point out that the Shimer decisions is 27 years old and that, apparently, the case has a

limited shelf life. Plaintiffs argue that recent Supreme Court opinions, particularly Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), have held that a regulation may not inferentially preempt state law. Thus, plaintiffs argue, because Shimer failed to address specifically whether 38 C.F.R. § 36.4323(e) preempted Pennsylvania law, the case is no longer valid. Plaintiffs further cite United States v. Stewart, 523 F.2d 1070 (9th Cir.1975) and United States v. Vallejo, 660 F.Supp.535 (W.D.Wash.1987) in support of its position.

This Court does not find either argument of plaintiffs persuasive. While it is clear that the laws and regulations governing VA guaranties do not preempt all state laws, it is also clear to the Court that state law may not impair the VA's independent right to seek indemnity pursuant to 38 C.F.R. § 36.4323(e). 38 U.S.C. § 1820(a)(6) applies only to the VA Administrator's power to acquire and manage property under the VA Home Loan Guaranty Program. Nothing in § 1820(a)(6) indicates an intent by Congress to adopt state anti-deficiency laws as federal law.

Second, despite plaintiffs' arguments to the contrary, the Court finds that United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961), and McKnight v. United States, 259 F.2d 540 (9th Cir.1958), are directly on point. Those cases specific-ally held that the VA has an independent right under 38 C.F.R. § 36.4323(e) to seek indemnity from a defaulting veteran where foreclosure leaves a deficiency which the VA as guarantor was required to pay the note holder, notwithstanding state statutes which might preclude such recovery by a guarantor other than the VA. The Court believes that to hold otherwise would fly directly in the face of these precedents. United States v. Stewart, 523 F.2d 1070 (9th Cir.1975), is distinguishable; there, the parties specifically struck language in a direct loan agreement between the VA and a veteran that provided that the loan would be governed by Title 38, United States Code, and regulations thereunder. In fact, the Stewart court noted that, had the language in question not been stricken, the case would have been governed by United States v. Shimer, supra. Stewart, 523 F.2d at 1072 n. 1.

Third, the Court does not find that Hillsborough County

v. Automated Medical Laboratories, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), and the other cases plaintiffs cite either explicitly or implicitly overrule Shimer. In Hillsborough, the issue was whether two local ordinances imposing licensing and identification requirements on plasma banks were preempted by federal law, given that the Food and Drug Administration had promulgated pervasive regulations of vendors of blood products. The Supreme Court noted that state and local laws may be preempted by federal regulations as well as by federal statutes. Id. at 713, 105 S.Ct. at 2375. However, the Court refused to hold that the local ordinances in question were preempted because there was no indication that Congress intended to reserve exclusive regulation of blood products vendors to the Federal Government. Id. at 714-15, 105 S.Ct. at 2375-76. In fact, the FDA expressly stated that it did not intend to "usurp the powers of State and local authorities to regulate plasmapheresis procedures in their localities." Id. at 714, 105 S.Ct. at 2375.

Here, the situation is entirely different. The Court agrees with plaintiff that Congress did not intend to preclude the

L.Ed.2d 664 (1982); see also Hillsborough, supra, 471 U.S. at 712, 105 S.Ct. at 2374 ("the Supremacy Clause ... invalidates state laws that 'interfere with, or are contrary to,' federal law." (quoting Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1, 211, 6 L.Ed. 23 (1824))). Because application of California Anti- Deficiency Law to VA-guaranteed veterans would conflict with 38 C.F.R. § 36.4323(e), the Court finds that Cal.Code Civ.Proc. § 580b does not bar the VA from seeking indemnity from California veterans who default on their VA-guaranteed loans.

2. Whether Federal Common Law Governs

Because the Court finds that 38 C.F.R. § 36.4323(e) expressly defines the VA's independent right to indemnity, it is unnecessary to determine whether federal common law provides an alternative ground for this right. Nevertheless, because the parties have extensively briefed this issue, the Court will address the issue of whether federal common law creates a nationwide federal rule permitting the VA to seek indemnity.

The parties agree that federal law governs the rights of the United States under a nationwide program. The parties disagree,

assuming § 36.4323(e) does not define the VA's right to indemnity, whether state law should be incorporated to provide the content of that federal law. See, e.g., Burks v. Lasker, 441 U.S. 471, 477, 99 S.Ct. 1831, 1836, 60 L.Ed.2d 404 (1979). In a case such as this one, which implicates a federal statute, the predominant consideration must whether Congress intended federal judges to develop their own rules or to incorporate state law to decide whether the VA has an independent right to seek indemnity from defaulting veterans. Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458 (9th Cir.1986).

The United States Supreme Court has established a three-part test to determine, in the absence of clear congressional intent, whether formulating a federal rule would be appropriate as a matter of judicial policy. United States v. Kimbell Foods, 440 U.S. 715, 728-29, 99 S.Ct. 1448, 1458-59, 59 L.Ed.2d 711 (1979). A court must determine: (1) whether the issue requires a "nationally uniform body of law"; (2) "whether application of state law would frustrate specific objectives of the federal programs"; and (3) whether "application of a federal rule would

disrupt commercial relationships predicated on state law." Id.; Mardan Corp., 804 F.2d at 1458. The Court now applies this test to the facts of this case.

a. Nationally Uniform Body of Law

Plaintiffs argue that the VA statute evinces a congressional intent not to displace state law with a nationally uniform body of law. Plaintiffs note that state law is expressly incorporated for VA-loan foreclosure proceedings, see 38 U.S.C. § 1820(a)(6), and that therefore state law should apply as to the VA's right to recover a deficiency as well. Plaintiffs further argue that, because the National Housing Act was amended in 1981 to create a uniform federal foreclosure remedy (see 12 U.S.C. § 3701), the Court can infer by Congress' failure to do the same for the VA statute that state anti-deficiency laws were intended to prohibit the VA from seeking indemnity from defaulting veterans. Plaintiffs also cite United States v. Vallejo, 660 F.Supp. 535, 537 (W.D.Wash.1987), in which the court determined there was no need for a uniform body of federal law with regard to the VA's indemnity rights.

Defendants argue that a uniform rule is needed because the VA-guaranty agreements expressly state that they are governed by federal law and are identical throughout the nation. Defendants note that, unlike the loan programs in Kimbell Foods, the VA guaranty agreements are not individually negotiated. Kimbell Foods, 440 U.S. at 730, 99 S.Ct. at 1459. Defendants refute plaintiffs' argument that, because state law governs the foreclosure procedure, it should also govern the VA's right to indemnity. Defendants argue that the post-foreclosure relationship between the veteran and the VA raises a separate issue.

The Court agrees with defendants that a nationally uniform rule is required. While Congress and the VA contemplated that foreclosure actions will be conducted under state law, 38 U.S.C. § 1820(a)(6), 38 C.F.R. §§ 36.4319, 36.4320 (1987), they did not contemplate the VA forfeiting its right to seek indemnity depending on the existence of a state anti-deficiency law. Clearly, the national interest is best served by having nationally-used, identical guaranty agreements to which the VA is a party provide uniform rights and responsibilities nationwide. See Clearfield

Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943); United States v. View Crest Garden Apartments, Inc., 268 F.2d 380 (9th Cir.), cert. denied, 361 U.S. 884, 80 S.Ct. 156, 4 L.Ed.2d 120 (1959). Subjecting the VA's indemnity rights under this national program to the "vagaries of the various state laws which might control" would increase the uncertainties the VA currently faces. United States v. Wells, 403 F.2d 596, 597-98 (5th Cir.1968). Further, the decentralized nature of the current loan program would be eroded should state anti- deficiency laws apply, as more VA involvement would be required to assess the risks according to law of the veteran-borrower's state. Cf. Kimbell Foods, 440 U.S. at 732, 99 S.Ct. at 1460 (where Small Business Administration used local SBA offices familiar with local law to approve SBA loan applications (as opposed to other lenders, as does the VA), uniform national rule was unnecessary).

Accordingly, the Court finds that, under the Kimbell Foods test, a uniform national rule permitting the VA to seek indemnity from veterans for moneys paid on its guaranty veterans

is required.

b. Frustration of Government Purposes

Much of the foregoing discussion is equally applicable to the second prong of the Kimbell Foods test. The VA clearly has an an objective in providing a nationally uniform means of safeguarding its interests in the security for its guaranty. Gatter v. Nimmo, 672 F.2d 343, 345 (3d Cir.1982). While the cost of the federal program is not a controlling factor in determining whether a uniform federal rule should apply, it may be considered in determining whether federal objectives are frustrated by adoption of state law. United States v. Pastos, 781 F.2d 747, 752 (9th Cir.1986).

Accordingly, the Court finds that adoption of Cal.Code of Civ.Proc. § 580b as federal law, thus preventing the VA from safeguarding its interests in the security for its guaranty, would frustrate important governmental objectives.

c. Disruption of Commercial Relationships Based Upon State Law

Plaintiffs suggest that the expectations of the

veteran-borrowers, their commercial and consumer creditors, and holders of non-purchase money security interests will be thwarted if the VA is permitted to collect a deficiency from defaulting veterans. This argument is without merit. First, as defendants have shown, it has been the VA's practice since at least 1945 to assert an independent right of indemnity against veterans whose deficiencies the VA has paid as guarantor. See Administrator's Decision No. 645, supra. Second, the indemnity agreements between the veteran and the VA plainly state that federal statutes and regulations govern their terms. They further state that disposition of the property will not relieve the veteran of liability for any guaranty claim which the VA is required to pay the lender on account of the veteran's default. Accordingly, it can hardly be argued that either the veteran or his other creditors would be surprised by the VA's enforcement of this right.

3. Summary

In sum, the Court finds that 38 C.F.R. § 36.4323(e) provides the VA with an express right to seek indemnity from a veteran who defaults on a VA-guaranteed loan which leaves a

deficiency after foreclosure. United States v. Shimer, 367 U.S. 374, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961) and McKnight v. United States, 259 F.2d 540 (9th Cir.1958) clearly hold that state anti-deficiency laws may not impair this right. Finally, even if § 36.4323(e) did not provide the VA with an independent right of indemnity, federal common law requires that such a right exist regardless.

D. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction

Because this Court finds that plaintiffs are not entitled to the relief they seek as a matter of law, it does not reach the issue of whether it has subject matter jurisdiction over defendants the United States, the Veterans Administration, and Leo Wurschmidt. Accordingly, this motion is denied as moot.

III. ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment is GRANTED;

2. Plaintiffs' motion for summary judgment is DENIED;

and

3. The motion to dismiss for lack of subject matter jurisdiction of defendants United States, the Veterans' Administration, and Leo Wurschmidt is DENIED as moot.

This Court shall enter judgment accordingly. Each side shall bear its own costs and attorneys' fees.

/S/
J.P. VUKASIN, JR.
UNITED STATES
DISTRICT JUDGE

No. 90-972

In the Supreme Court of the United States

OCTOBER TERM, 1990

BRUCE M. JONES, ET AL., PETITIONERS

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Department of Veterans Affairs guarantees home loans made to veterans by private lenders. The question presented is whether regulations that create a federal right to indemnity against a veteran who has defaulted on his mortgage preempt a conflicting California law that prohibits such indemnification.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-972

BRUCE M. JONES, ET AL., PETITIONERS

v.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A7) is unreported. The decision of the district court (Pet. App. B1-B28) is reported at 699 F. Supp. 795.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1990. The petition for a writ of certiorari was filed on December 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs provides housing assistance to qualified veterans by guaranteeing home

loans made to the veterans by private lenders.[1] See 38 U.S.C. 1801-1833. When a veteran obtains a VA-guaranteed loan, he must sign "indemnity agreements," see Pet. App. B5-B6, that set out the terms of the guaranty. *Ibid.* These agreements state that they are governed by federal law and that the veteran will be liable for all amounts paid by the VA in the event of default. *Id.* at B6. The implementing regulations likewise provide that federal law "shall govern the rights, duties, and liabilities of the parties," 38 C.F.R. 36.4334, and establish that any amounts paid to the lender by the VA "constitute a debt owing to the United States by [that] veteran," 38 C.F.R. 36.4323(e).

If the veteran defaults on a VA-guaranteed loan, the lender may foreclose on the property pursuant to the law of the state where the property is located. See 38 U.S.C. 1820(a)(6). If a deficiency on the mortgage debt remains after foreclosure and sale of the property, the VA must reimburse the lender up to the amount of its guaranty. See 38 C.F.R. 36.4321; Pet. App. B7. The regulations provide two means by which the VA may recover from the veteran the amount paid on the guaranty: first, the VA is subrogated to the rights of the lender and can pursue any cause of action the lender would have against the veteran, 38 C.F.R. 36.4323(a); second, since the amount the VA paid on the veteran's behalf constitutes a debt to the United States, the VA may seek direct indemnification from the veteran, 38 C.F.R. 36.4323(e); see 1 V.A. Dec. 1154 (1945).

2. Petitioners, two veterans and the wife of one of the veterans, Pet. App. B1-B2,[2] obtained VA-guaranteed home

[1] The Department of Veterans Affairs was formerly the Veterans Administration, see Pet. App. B1, and for ease of reference we refer to it as "the VA."

[2] Petitioners sought to represent the class of similarly situated California veterans and spouses, but the district court did not reach the issue of class certification. See Pet. App. B3.

loans on which they defaulted. *Id.* at B2. The lenders foreclosed and sold the properties, and the resulting deficiencies were paid by the VA pursuant to its guaranty. *Ibid.* Petitioners brought this action in United States District Court for the Northern District of California seeking an injunction against VA indemnity proceedings against them. *Id.* at B2-B3. Petitioners contended that the VA could not proceed against them by virtue of California's Anti-Deficiency Law, Cal. Civ. Proc. Code § 580b (West 1976), which bars the holder of a loan secured by real property from collecting deficiencies remaining after foreclosure and sale of the property, and also prohibits the guarantor of such loans from seeking indemnity against his principal. See Pet. App. B8-B10; *Commonwealth Mortgage Assurance Co.* v. *Superior Court*, 211 Cal. App. 3d 508, 259 Cal. Rptr. 425 (1989).

The district court granted summary judgment for the VA. Pet. App. B27-B28. Relying on *United States* v. *Shimer*, 367 U.S. 374 (1961), and *McKnight* v. *United States*, 259 F.2d 540 (9th Cir. 1958), the court determined that the VA's independent right to indemnity under 38 C.F.R. 36.4323(c) allowed it to recover from petitioners, "notwithstanding state statutes which might preclude such recovery by a guarantor other than the VA." Pet. App. B17. The district court held that although the California anti-deficiency law might limit the VA's right to subrogation, that law directly conflicted with the VA's independent right to indemnity and was therefore "nullified." *Id.* at B19.[3]

[3] The district court held alternatively that "federal common law creates a nationwide federal rule permitting the VA to seek indemnity." Pet. App. B20. Applying the test of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979), the court concluded that the nationwide guaranty program was best served by a uniform rule of law, that adoption of state law would frustrate the integrity of the program, and that the exercise of the VA's independent right of indemnification would not disrupt commercial expectations. Pet. App. B20-B26.

3. The court of appeals affirmed. The court held that it had already "considered this precise issue" in *United States v. Rossi*, 342 F.2d 505 (9th Cir. 1965), where it held that the VA's right to indemnity conflicted with, and therefore displaced, this very state law. Pet. App. A4-A5. *Rossi*, the court stated, "is still the law in this circuit," and under that decision "federal law preempts state law." *Id.* at A6-A7.[3]

ARGUMENT

The court of appeals, following earlier decisions involving the same regulations at issue here, simply reaffirmed that a long-standing federal regulation whose validity this Court has upheld may not be thwarted by conflicting state law. That decision is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Petitioners principally contend (Pet. 11-16) that the courts below erroneously relied on *Shimer* to find that the VA's regulations preempted California's anti-deficiency statute.

The facts of *Shimer* are quite similar to those here. The VA brought indemnification proceedings against a defaulted veteran on whose behalf the VA had repaid a lender under the same guaranty program at issue in this case. *Shimer*, 367 U.S. at 375-376. This Court rejected the veteran's assertion that the Pennsylvania Deficiency Judgment Act pro-

[3] The court of appeals noted its recent reaffirmance of *Rossi* in *Whitehead v. Derwinski*, 904 F.2d 1362 (9th Cir. 1990), where the court confronted another state's antideficiency law. There, however, the court of appeals held that the state law was not preempted because it allowed the VA to exercise its right to subrogation through a judicial foreclosure, and therefore the state law did not invariably conflict with federal regulations, unlike the California law at issue here. *Whitehead* distinguished the present case on that ground, and the court of appeals in this case likewise distinguished *Whitehead*. See Pet. App. A5-A6.

hibited the VA from proceeding against him. Instead, the Court determined that the state procedures for calculating a deficiency were displaced by federal procedures for doing so. *Id.* at 377-381.

Most importantly for present purposes, the Court rejected the veteran's argument that the VA had no right to indemnity independent of its right to subrogation. Instead, the Court held that "the statute affords an independent right of indemnity to the Veterans' Administration." *Shimer*, 367 U.S. at 387. That was so because "waiver of a guarantor's normal rights * * * would deprive the guarantor of any recovery on occasions when the mortgagee's rights were limited as against the debtor by state law, yet were protected against the [VA] by state or federal law. Relief from liability in these circumstances would convert a guaranty into a grant of aid," in contravention of "the entire history" of the program. *Id.* at 386-387.[5]

Conversion of their guaranties into grants of aid is precisely what petitioners seek here. As they concede (Pet. 8), "California law * * * absolutely prohibit[s] the VA from collecting * * * from petitioners." Yet, since the lender's rights are protected against the VA by federal regulations—the VA must pay the guaranty—allowing petitioners to escape liability to the VA would turn what Congress designed as a guaranty program into a grant program. This situation is exactly the one *Shimer* sought to avoid by affirming the VA's independent federal right to indemnification from the veteran. The district court and the court of appeals therefore correctly relied on *Shimer* for the disposition of this case.

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[5] *Shimer* noted with approval the Ninth Circuit's decision in *McKnight* v. *United States*, 259 F.2d 540 (1958). See *Shimer*, 367 U.S. at 387.

Congress recently restructured the VA Home Loan program. See Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, Tit. III, §§ 301-313, 103 Stat. 2069-2078 (to be codified at 38 U.S.C. 1803). The statutory changes eliminate the independent federal right to indemnity (as well as the right to subrogation) for VA-guaranteed loans closed after January 1, 1990, but preserve both rights for loans closed before that date.[6] The issue presented here is therefore one of diminishing importance not appropriate for review by this Court.

2. California law directly conflicts with the federal scheme and is irreconcilable with it: the state bans indemnity completely, and the federal rule creates a right to indemnity. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57 (1988). Thus, basic preemption principles provide for the primacy of the federal regulation. Although Congress has "not completely displaced" state regulation in this area (as evidenced by its general incorporation of state foreclosure proceedings), "state law is nullified to the extent that it actually conflicts with federal law." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982), as it does here. As described above, "state law 'stands as an obstacle to the accomplishment and execution of the full purposes

[6] By doing so, Congress implicitly ratified both *Shimer* and the VA's longstanding practice. Although Congress was made aware of pending lawsuits, including this one, challenging the VA's right to indemnification, and was urged to eliminate that right and the right to subrogation, see *Hearing Before the Subcomm. on Housing and Memorial Affairs of the House Comm. on Veterans' Affairs*, 101st Cong., 1st Sess. 76-77 & n.1 (1989) (prepared statement of Mr. David Leen), it instead left indemnification and subrogation intact for loans closed before 1990). As this Court has stated, "[w]here an agency's statutory construction has been fully brought to the attention of * * * Congress, and [it] has not sought to alter [the] interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982) (citations omitted).

and objectives of Congress.'" *Ibid.*, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 676 (1941); see *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 712-713 (1985). Therefore, as both courts below correctly held,[7] the VA has an independent federal right to indemnification from petitioners that California may not block.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

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[7] Their holdings were not novel, for *United States* v. *Rossi*, *supra*, and *McKnight* v. *United States*, *supra*, reached identical conclusions.

[8] Petitioners' remaining argument is without merit. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and the other cases they rely upon address the question of what law governs federal programs when there is no specified federal rule, and are therefore irrelevant where, as here, there is a direct conflict between federal regulations and state law.

No. 90-972

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I. ARGUMENT

1. The Issues Presented are of Substantial Importance.

The Government attempts to minimize the importance of this case by noting that for VA guaranteed loans closed after January 1, 1990, recent statutory changes expressly preclude deficiencies (Br. in Opp. 6). That is small comfort to the thousands of California veterans who obtained VA guaranteed loans prior to January 1, 1990, and who have been, are being, and will be pursued by the VA for amounts claimed to approximate in excess of $200,000,000. That figure, provided by the VA some three years ago, is surely conservative in light of the enormous increases in foreclosures during the past two years. Moreover, Oregon and Arizona have anti-deficiency laws similar to California's, and class actions challenging the VA's similar position in those states are currently on appeal (*See* Pet. 5). And, of course, the VA will continue to collect these sums by administrative off-set regardless of any statute of limitations. *See* 38 U.S.C. 3114(c).

2. The Government Erroneously Interprets Congressional Silence. The Government argues that 1989 amendments of the VA legislation "implicitly" support the VA's attempt to collect deficiencies arising from foreclosures in California of 1989 and earlier loans (Br. in Opp. 6, fn. 6). But attaching significance to current congressional silence as a measure of what the law as enacted by an earlier Congress actually meant is sheer conjecture. Indeed, it is at least as reasonable to infer that by not expressly stating its intention to ratify the VA's interpretation of state anti-deficiency law protections, Congress intended to leave those protections in place for the pre-1990 loans. The Ninth Circuit agrees (*See* Pet. 5).

3. Application of California Law Does Not Constitute a "Grant". The Government quotes the *Shimer* language expressing concern that failure of the VA's "indemnity" rights against the borrower could convert the guaranty into a "grant" (Br. in Opp. 5). It is difficult to understand how anyone who has paid an insurance premium to the VA in connection with a loan (*See* 38 U.S.C. 1829), made payments on that loan, defaulted (in many

cases due to circumstances beyond the veteran's control, such as military transfer, illness, or job loss) and lost the home and equity in it through foreclosure, without any rights of redemption, can be regarded as having been the recipient of a "grant". The implication of unjust enrichment is not warranted, particularly since California's non-judicial process is among the least expensive and speediest in the nation to the special advantage of the foreclosing creditor.

4. California Law Does Not "Directly Conflict" with VA's Indemnity Regulation. Contrary to the VA's position (Br. in Opp. 6), California law does not "directly conflict" with VA's indemnity regulation, and it need not have been so construed. The regulation, 38 C.F.R. 36.4323(e), purports to obligate veterans for "[a]ny amounts paid by the [VA] on account of the liabilities of any veteran guaranteed..." under the Act (emphasis added). As noted in our opening brief (p. 14), under California foreclosure law, which the VA directs its lenders to follow, the veteran, following foreclosure of his home, is not liable to anyone, lender or guarantor. There is thus no conflict between

California's foreclosure law and the indemnity regulation. At best, the conflict is ambiguous and should not be resolved in a manner which prejudices California veterans. [1]

5. There is no "Indemnity Agreement".

Finally, the VA unfairly characterizes the form documents signed by veteran borrowers as "indemnity agreements" (Br. in Opp. 2). It is unseemly for the VA to engage in this sort of bootstrapping. In the applicable form, VA Form 26-1820, nowhere does it say "indemnity agreement". The language relied upon by the VA in that form relates solely to a situation where the borrower, without VA approval, sells the home to a third party who assumes the loan and then defaults. It recites that "This debt will be the object of established collection procedures." (Emphasis added.) The remainder of the paragraph, not quoted by the VA, emphasizes again the consequences of selling to

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[1] This court recently reaffirmed that in areas "traditionally occupied by the states, Congressional intent to supersede state laws must be clear and manifest." *English v. General Electric Co.*, ____ *U.S.* ____ *110 S. Ct. 2270, 2275 (1990). See also United States v. Church, 736 F. Supp. 1494 (N.D. Ind. 1990); United States v. Davis v. Derwinski,* ____ *F. Supp* ____ *(D. Minn. 1991).*

someone who cannot obtain new financing.

Even if this language were to be given the limited applicability required by its terms (i.e., to veteran borrowers who sell to assuming purchasers whose later default gives rise to a deficiency), the VA does not pursue for deficiencies only borrowers who sold houses to assuming buyers who defaulted. It pursues everyone, regardless of the cause of the default. Moreover, to a knowledgeable California borrower, "established collection procedures" means that recourse is limited to the security property, and that the borrower is not personally at risk. To a less sophisticated borrower, it is simply fine print gobbledegook.

There is thus no "indemnity agreement" in this case. The veterans have incurred no "obligations" under such "agreements". Whatever rights the VA has to recover deficiencies from California veterans can arise solely out of the claimed preemptive effect of 38 C.F.R. 36.4323(e), an ambiguous regulation, which itself is without a clear and necessary statutory anchor.

II. CONCLUSION

Various states have promulgated foreclosure laws that balance the interests of their citizens. Congress has directed that state foreclosure laws be used when there is a default on a VA guaranteed loan. This Court has been solicitous of state laws protecting debtors, particularly where property matters are involved. Accordingly, the VA, in using state foreclosure law, should comply with all state law requirements, not just those designed to benefit creditors.

For the reasons stated in the Petition and in this Reply the Petition for a Writ of Certiorari should be granted.

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Dated: February 22, 1991